

“THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE ACT, 2013: A LONG DUE ‘HASTY’ LEGISLATION”

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ABSTRACT

When it takes almost two decades to address an issue and mould it into a legislative enactment, one can be almost certain that it must have been done the right way. However, the Sexual Harassment of Women at Workplace Act, 2013 falls short. In any workplace, a person's survival is largely depended on his or her relationship with the employer and fellow employees. It is the right of every person not only to the monetary benefits of one's work but to an all-encompassing environment, which helps in generating productive output. India has not addressed the issue of sexual harassment at workplace until 1997; even then it was done by the judiciary in a landmark decision. However, it took close to sixteen years after the decision to put it down into a statute. Right to a healthy work environment and right to dignity are undeniable rights of every person and in the present article the author assesses the statute on the touchstone of these rights, appreciating the same as well as bringing out the 'double-edged sword' nature of the Act. The author sails through the history behind the legislation, the significant provisions of the Act and assesses the Act in terms of its success-failure quotient. On paper, perhaps, the legislation seems strong enough to tackle a problem, that is quite rampant in every work sector, whether we accept it or not. However, in practice there are many impediments that the victim faces in order to actually enjoy the advantage or convenience that the statute intends to provide.

KEYWORDS: Sexual Harassment, Workplace, Legislation, Work Environment, Dignity

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INTRODUCTION

‘Every individual deserves the fruits of his own labour’ – a statement used in common parlance. Legally speaking, it would mean that every individual is entitled to enjoy the rights flowing from his labour, whether they are monetary rights, legal rights, human rights or constitutional rights. Economic and social rights forming an integral part of human rights are duly recognised by the United Nations in the Universal Declaration of Human Rights (UDHR). Labour rights find their place under these social economic rights, which target the welfare of vulnerable groups. In addition to the UDHR, many International Labour Organization (ILO) conventions also deal with social and economic rights. However, the problem with such rights is not in its validity but in the level of execution.

When India gained independence in 1947, social justice was one of the aims of the constitution drafters and labour welfare was one of the means to fulfil that goal. It became a social responsibility to ensure that the labour class enjoy all the rights that protect them against various atrocities. Therefore, apart from the constitutional provisions, other legislations were implemented to grant specific status to specific rights. In post-independent India, many labour legislations were enacted to protect and promote the interest of working class like the Equal

Remuneration Act, 1976 providing equality in pay for both men and women; Minimum Wages Act, 1948 ensuring minimum wages; Maternity Benefit Act, 1961, granting maternity benefits to women; Child Labour (Prohibition and Regulation) Act, 1986 prohibiting employment of children below the age of fourteen; and the recent Sexual Harassment of Women at Workplace (Prevention, Prohibition And Regulation) Act, 2013 aiming at a healthy and safe work environment.

In today's competitive market, these labour rights have gained further attention because survival has now become dependent on these rights. Further, the prevailing competitive economy has brought these rights to the forefront as people are no longer ignorant of their rights. For instance, the right to collective bargaining through legal strikes or redressing grievances through representation by trade unions have become much more organised and effective because both, the employer and the employees, are aware of the repercussions of exercising these rights. Likewise, expecting or rather demanding a safe and healthy work environment is the right of every employee and a corresponding duty lies with the employer to ensure that the same is offered.

Each person is guaranteed the right to work, and it does not mean simply the right to earn a livelihood. It is the duty of the State that along with providing adequate opportunities for making a living, it has to ensure that the working conditions are not inhuman or degrading to the dignity of any individual. Article 23(1)¹ of the UDHR provides the right to just and favourable conditions of work. The right to work and right to favourable working conditions are included in the same sub-section, implying that both these rights are complementary to each other and one cannot exist without the other.

Earlier, a safe workplace meant protection from hazardous substances or providing decent working conditions. Over the past two decades, however, 'safe' or 'decent' working conditions have escalated to include many more factors and unarguably, one important aspect of right to dignified working conditions and a primary labour right is prevention of sexual harassment at workplace.

Irrespective of gender and nature of work, sexual harassment at workplace, is quite common. ILO defines sexual harassment at workplace as:²

"Sexual harassment is-

- Any physical, verbal or non-verbal conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men, which is unwelcome, unreasonable and offensive to the recipient.
- Where a person's rejection of, or submission to, such conduct is used explicitly or implicitly as a basis for a decision which affects that person's job.
- Conduct that creates an intimidating, hostile or humiliating working environment for the recipient."

¹ UDHR, Article 23:

1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

² "When Work Becomes A Sexual Battleground," International Labour Organization, accessed March 27, 2016, [http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_205996/lang-en/index.htm?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+ungen+\(UN+gender+equality+news+feed\)](http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_205996/lang-en/index.htm?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+ungen+(UN+gender+equality+news+feed)).

While the ILO is gender neutral, the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) describes sexual harassment in the workplace as “such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.”³

This paper is structured as follows: Firstly, a brief note on concept of dignity and sexual harassment at workplace; secondly, the history behind the Act of 2013; followed by an analysis of the statute and victims’ access to justice; thereafter the conclusion.

‘DIGNITY’ AND SEXUAL HARASSMENT AT WORKPLACE

The UDHR was pivotal in popularizing the use of ‘dignity’ or ‘human dignity’ in human rights discourse.⁴ The Preamble of the Declaration also reaffirms the importance of ‘human dignity’. The idea of human dignity refers to some intrinsic value inhering in the status of being human, a value that is equally shared by all human beings, but which somehow elevates them above all non-human animals.⁵

Some important consequences follow from this understanding of human dignity. First, human dignity inheres in a human being from the moment of their coming into existence as an individual human being until their death (and in some ways retains significance beyond their death), and this is so irrespective of the choices (e.g. to engage in wrong-doing, to neglect developing or exercising their capacities, etc) or condition (e.g. embryonic, diseased, comatose, etc.) of the human being in question at any stage of their life.⁶ Second, since what matters is the possession of a human nature, the value of human dignity remains constant across different persons despite other ethically significant variations among them.⁷

Therefore, dignity of an individual is an indispensable feature of being a human and under no circumstances should the same be compromised. The Indian Constitution also approves of this concept, under Article 21⁸. Post the *Maneka Gandhi v. Union of India*⁹ case, a new dimension was added to the ‘Right to Life’, whereby the Supreme Court held that the ‘right to live’ is not merely confined to physical existence but it includes within its ambit the right to live with human dignity. This fundamental right has been, time and again, re-asserted in several judicial decisions. In *Peoples Union for Democratic Rights v. Union of India*¹⁰, popularly known as the Asiatic Workers’ Case, the Supreme Court has specifically enunciated the right of workers to live with human dignity under Article 21.

³ Dr. Muzaffar Syah Mallow, “Sexual Harassment in the Workplace: An Overview over the International Law and Current Law and Practice in Malaysia,” *International Journal of Humanities and Social Science* 77 (2013), accessed March 27, 2016, http://www.ijhssnet.com/journals/Vol_3_No_13_July_2013/10.pdf.

⁴ Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights,” *The European Journal of International Law* Vol. 19 no. 4 (2008), accessed March 27, 2016, <http://ejil.org/pdfs/19/4/1658.pdf>

⁵ John Tasioulas. “Human Dignity And The Foundations Of Human Rights,” accessed March 27, 2016, https://www.academia.edu/2624522/Human_Dignity_and_the_Foundations_of_Human_Rights

⁶ John Tasioulas. “Human Dignity And The Foundations Of Human Rights,” accessed March 27, 2016, https://www.academia.edu/2624522/Human_Dignity_and_the_Foundations_of_Human_Rights

⁷ John Tasioulas. “Human Dignity And The Foundations Of Human Rights,” accessed March 27, 2016, https://www.academia.edu/2624522/Human_Dignity_and_the_Foundations_of_Human_Rights

⁸ Article 21, Constitution of India: Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁹ AIR 1978 SC 597.

¹⁰ AIR 1982 SC 1473.

From this right of living with dignity, flows a corollary right of 'just and favourable working conditions' or 'dignified working conditions'. Whether it is Article 23(1) of the UDHR or Article 11(f)¹¹ of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) or Article 42¹² of the Indian Constitution – they all reiterate the same. When a person is subjected to harassment, of any kind, in his place of work, that in itself curbs the right to proper working conditions; sexual harassment, however, is not only a violation but a direct jolt to the individual's inherent dignity as a human being.

In a workplace, whether small or big, the survival of an individual depends on his/her relationship with the employer and fellow employees and under such circumstances when someone is subjected to sexual harassment either from his/her employer or colleagues, the victim not only has a career at stake but also undergoes mental trauma. With a single blow the person's human rights, right to a dignified life, right to dignified working conditions and right to earn a livelihood, all are scarred. This is where the justice mechanism steps in to give assurance to the victim that his/her grievance shall be redressed.

As early as in 1993, at the ILO Seminar held at Manila, it was recognized that sexual harassment of women at the workplace was a form of gender discrimination against women.¹³ That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations admits of no debate.¹⁴ Although harassment knows no gender, more often than not and results of various surveys reveal that mostly women are subjected to sexual advances of one or the other kind at workplaces. In general, sexual harassment at workplace is categorized into two distinct types:¹⁵

'Quid pro quo' – This can be termed in layman language as 'blackmail', where the superior employee or the employer seeks sexual favors or advances either in exchange for work benefits, like promotion and bonus or simply for the subordinate to retain his/her job. A single instance of harassment is sufficient to sustain a quid pro quo claim (e.g., a superior demands you kiss her/him in order to keep your job).^{16 17}

'Hostile Working Environment' is a more prolonged form of harassment, wherein the victim is subjected to conduct, severe enough to create an abusive or offensive working environment.¹⁸ An atmosphere of sexism in the workplace has a harassing effect, without it being necessary for victims to prove that they have suffered physical

¹¹ Article 11, Convention on the Elimination of All Forms of Discrimination against Women: States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

¹² Article 42, Constitution of India: Provision for just and humane conditions of work and maternity relief - The State shall make provision for securing just and humane conditions of work and for maternity relief.

¹³ *Apparel Export Promotion Council v A.K.Chopra*, (1999) 1 SCC 759

¹⁴ *Apparel Export Promotion Council v A.K.Chopra*, (1999) 1 SCC 759

¹⁵ "Sexual harassment at work," accessed March 27, 2016, <http://employment.findlaw.com/employment-discrimination/sexual-harassment-at-work.html>.

¹⁶ "Sexual harassment at work," accessed March 27, 2016, <http://employment.findlaw.com/employment-discrimination/sexual-harassment-at-work.html>.

¹⁷ Katherine Lippel & Diana Demers, "Access to Justice for Sexual Harassment Victims: The Impact of Béliveau St-Jacques on Female Workers' Right to Damages," accessed March 27, 2016, [http://www.researchgate.net/profile/Katherine_Lippel/publication/237230229_Access_to_Justice_for_Sexual_Harassment_Victims_The_Impact_of_Bliveau_St-Jacques_on_Female_Workers'_Right_to_Damages_\(Translation\)/links/02e7e51bf5400d1e8a000000.pdf](http://www.researchgate.net/profile/Katherine_Lippel/publication/237230229_Access_to_Justice_for_Sexual_Harassment_Victims_The_Impact_of_Bliveau_St-Jacques_on_Female_Workers'_Right_to_Damages_(Translation)/links/02e7e51bf5400d1e8a000000.pdf).

¹⁸ "Sexual harassment at work," accessed March 27, 2016, <http://employment.findlaw.com/employment-discrimination/sexual-harassment-at-work.html>.

consequences or that the harassment is directly related to the loss or withholding of specific workplace benefits.¹⁹

Sexual harassment is a serious manifestation of sex discrimination at the workplace and a violation of human rights. It undermines equality, calling into question the integrity, dignity, physical and psychological well-being of workers.²⁰ This results not only in unhealthy and damaged work culture or relationships but also in generating low productivity in the work sector. As per ILO figures of 2009-10, the percentage of women work force in our country is as low as 29% compared to a staggering 81% of men; and in the last five years with all the women empowerment that India has witnessed we could attribute probably another 5% to the then figure. Even then, the percentage of women labour is abysmally low and if they are subjected to sexual harassment at their workplaces or are deprived of safe working conditions, the figures could dip further.

HISTORY BEHIND THE ACT OF 2013

In India, the issue of sexual harassment at workplace was not addressed until 1997 in *Vishaka v. State of Rajasthan*.²¹ In this case, India witnessed the zenith of judicial activism by the Supreme Court in the legal history of the nation. The petition arose from the incident of a brutal gang rape of a social worker, *Bhanwari Devi*, in Rajasthan. As part of her work she made efforts to prevent a child marriage, which nevertheless took place. However, she had to pay the price by being subjected to social boycott and subsequently was gang raped by five men. What followed were a series of traumatic incidents including hostility and humility not only from the society but from the police and medical authorities as well. Despite several efforts, the accused were acquitted by the trial court. The case was subsequently taken up by women activists and was filed by a NGO called *Vishaka*, who filed a Public Interest Litigation (PIL) seeking the court to address the issue of sexual harassment of women at workplaces.

The court held that such incidents apart from being a violation of Articles 14²², 15²³ and 21²⁴, are also a gross

¹⁹ Katherine Lippel & Diana Demers, “Access to Justice for Sexual Harassment Victims: The Impact of Béliveau St-Jacques on Female Workers' Right to Damages,” accessed March 27, 2016, [http://www.researchgate.net/profile/Katherine_Lippel/publication/237230229_Access_to_Justice_for_Sexual_Harassment_Victims_The_Impact_of_Bliveau_St-Jacques_on_Female_Workers'_Right_to_Damages_\(Translation\)/links/02e7e51bf5400d1e8a000000.pdf](http://www.researchgate.net/profile/Katherine_Lippel/publication/237230229_Access_to_Justice_for_Sexual_Harassment_Victims_The_Impact_of_Bliveau_St-Jacques_on_Female_Workers'_Right_to_Damages_(Translation)/links/02e7e51bf5400d1e8a000000.pdf).

²⁰ Tine Staermose, “India Must Have Zero Tolerance For Workplace Sexual Harassment,” accessed March 27, 2016, http://www.ilo.org/asia/info/public/WCMS_220527/lang--en/index.htm.

²¹ AIR 1997 SC 3011.

²² Constitution of India, Article 14: Right to Equality – The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

²³ Article 15: (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to— (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. (3) Nothing in this article shall prevent the State from making any special provision for women and children. 1 [(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.] 2 [(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.]

²⁴ Article 21: No person shall be deprived of his life or personal liberty except according to procedure established by law

violation of the fundamental right guaranteed under Article 19(1)(g)²⁵. Since there was no particular legislation in the country, which addressed the offence of sexual harassment at workplace, the Supreme Court imbibed the provisions of the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region, to which India ratified in 1993. These guidelines were incorporated as part of domestic law, applicable to workplaces across the nation. The court prescribed a number of guidelines, which were to be treated as law under Article 141²⁶ of the Constitution.

The guidelines prescribed were as follows:-

- “Sexual harassment includes such unwelcome sexually determined behaviour as physical contacts and advance, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions.”
- Duty of employer to prevent commission of such acts of sexual harassment.
- Employer should take necessary steps to resolve, settle or prosecute such acts.
- Employer should take appropriate steps to prevent sexual harassment of its employees, irrespective of whether it is a private or public sector.
- The definition of prohibition of sexual harassment should be notified, published and circulated in the workplace.
- Prohibition of such acts and penalties for the same should be included in the rules and regulations.
- Appropriate working conditions should be provided to prevent hostility towards women employees.
- Where the conduct falls specifically under any offence of the Indian Penal Code or any other statute, appropriate action should be taken.
- Ensure non-victimization of witnesses.
- The victim should have the option to seek transfer of the perpetrator or a self-transfer.
- A time-bound complaint mechanism should be introduced in every workplace to deal with cases of sexual harassment.
- Forming a Complaint Committee.
- Maintaining confidentiality.
- The Complaints Committee should be headed by a woman and not less than half of its members should be women.
- A third party, familiar with the issue of sexual harassment, should be involved.
- Annual report of the Committee should be submitted to the Government.
- Issues and complaints of sexual harassment should be allowed to be raised in employer-employee meetings.

²⁵ Article 19: Right to Freedom - (1) All citizens shall have the right— (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; (g) to practise any profession, or to carry on any occupation, trade or business.

²⁶ Constitution of India, Article 141: The law declared by the Supreme Court shall be binding on all courts within the territory of India.

- Create awareness.

The court directed that these guidelines were binding and enforceable in a court of law until a reasonable and appropriate legislation was framed and enacted to deal with the issue. Post this judgment, every employment sector was to mandatorily follow the guidelines and all cases of sexual harassment were decided on the basis of the *Vishaka* judgment. However, despite the judgment becoming a ‘pseudo law’, the absence of a statutory enactment led to another PIL in the year 2012 – *Medha Kotwal Lele and Others v. Union of India and Others*.²⁷ The petitioners moved the court for lack of effective implementation of the *Vishaka* guidelines and stated that the attitude of neglect in establishing effective and comprehensive mechanism in letter and spirit of the *Vishaka* guidelines by the States as well as the employers in private and public sector had defeated the very objective and purpose of the guidelines.²⁸ As result of this petition, the Supreme Court had to re-evaluate the implementation of its 1997 landmark decision. Notices were issued to the Central Government, all State Governments and the Union Territories, asking them to report to the Supreme Court on the measures taken by them for complying with the *Vishaka* guidelines.²⁹ It was found that the directions issued in *Vishaka* case were not properly implemented by the various States/Departments/Institutions. As a result of this inquiry, service rules of State and Central Governments were amended and Complaint Committees were set up in public as well as private sector organization. However, it was not entirely successful. Thereafter, an incident that jolted the entire nation in December 2012 (the *Nirbhaya* case) led to the Justice Verma Committee Report, whereby the definition of ‘sexual harassment’ was modified under the Criminal (Amendment) Act, 2013 and the Sexual Harassment Bill, which had been lying dormant for several years was re-analysed.

THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013 AND VICTIM’S ACCESS TO JUSTICE

Unfortunately, it took us sixteen long years and another major petition to realise that the judgment and guidelines given by the Supreme Court in the *Vishaka* case should be materialised into a statutory enactment. The four pivotal pillars of the Act are:-

- ‘Sexual harassment’,³⁰ which has been defined as per the definition given in the judgment.
- Workplace³¹

²⁷ (2013) 1 SCC 311.

²⁸ (2013) 1 SCC 311

²⁹ Daphne Barak-Erez and Jayna Kothari, “When Sexual Harassment Law Goes East: Feminism, Legal Transplantation, And Social Change,” *Stanford Journal of International Law* (2011), accessed March 28, 2016, http://www2.tau.ac.il/InternetFiles/news/UserFiles/J_Barak.pdf.

³⁰ The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, § 2(n) (2013): "sexual harassment" includes any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely:--

(i) physical contact and advances; or
(ii) a demand or request for sexual favours; or
(iii) making sexually coloured remarks; or
(iv) showing pornography; or
(v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature

³¹ Act of 2013, § 2(o): "workplace" includes--

(i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;

- Employer³²
- Employee³³

These four terms basically define the perimeter, within which the offence of sexual harassment is committed. The Act lays down the complete procedure to be followed by the aggrieved in order to make a complaint.³⁴ Key features of the Act are:-

- Fortunately, 'domestic workers' are included within the ambit of the Act. The Bill originally did not have any such provision.
- The two redressal forums are the Internal Complaints Committee and the Local Complaints Committee, both being bestowed with the powers of a civil court.
- The complaint can be made, either by the victim herself or by any other person on her behalf.
- The complaint, in written, has to be made within a time frame of three months from the date of incident.
- First, efforts should be made for conciliation between the accused and the victim.³⁵ It may be noted that the Act doesn't allow monetary settlement during conciliation process.³⁶

(ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service;

(iii) hospitals or nursing homes;

(iv) any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;

(v) any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey;

(vi) a dwelling place or a house;

³² Act of 2013, § 2(g): "employer" means--

(i) in relation to any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit of the appropriate Government or a local authority, the head of that department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit or such other officer as the appropriate Government or the local authority, as the case may be, may by an order specify in this behalf;

(ii) in any workplace not covered under sub-clause (i), any person responsible for the management, supervision and control of the workplace

Explanation. --For the purposes of this sub-clause "management" includes the person or board or committee responsible for formulation and administration of policies for such organisation;

(iii) in relation to workplace covered under sub-clauses (i) and (ii), the person discharging contractual obligations with respect to his or her employees;

(iv) in relation to a dwelling place or house, a person or a household who employs or benefits from the employment of domestic worker, irrespective of the number, time period or type of such worker employed, or the nature of the employment or activities performed by the domestic worker.

³³ Act of 2013, § 2(f): "employee" means a person employed at a workplace for any work on regular, temporary, ad hoc or daily wage basis, either directly or through an agent, including a contractor, with or, without the knowledge of the principal employer, whether for remuneration or not, or working on a voluntary basis or otherwise, whether the terms of employment are express or implied and includes a co-worker, a contract worker, probationer, trainee, apprentice or called by any other such name.

³⁴ Veena Gopalakrishnan, Ajay Singh Solanki and Vikram Shroff, "India's New Labour Law - Prevention Of Sexual Harassment At The Workplace," *HR Law Hotline*, accessed March 28, 2016,

http://India_s_New_Labour_Law_Prevention_of_Sexual_Harassment_at_the_Workplace.pdf

³⁵ § 10(1), Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013

³⁶ Ranga & Associates, "Sexual Harassment Act – Salient features," accessed March 28, 2016, <https://rangachenna.wordpress.com/2014/09/17/sexual-harassment-act-salient-features/>.

- Failing conciliation, the inquiry has to be completed within a period of 90 days.
- The inquiry report has to be submitted within 10 days.
- In case of false or malicious complaints, action is taken against the complainant.
- If the alleged person is found guilty, punishment is awarded as per the service rules of the employer.
- The Act lays down the ‘duties of employer’.³⁷
- Penalties are prescribed for the employer in case the provisions of the Act are not complied with.

In letter and spirit the statute tries to ensure that the victim gets complete access to justice. Apart from being entitled to a safe and healthy work environment, every woman is also entitled to fair and hassle-free proceedings in case she faces sexual harassment. Furthermore, every minute detail of the case, including the names of the petitioner/respondent, is kept confidential. Although the Act provides the necessary mechanisms, more often than not, it is not easy for a woman to avail the same when she is trapped in a situation like that. When one talks about women as victims and their access to justice, one has to keep in mind the cross-section of women, ranging from rural to semi-urban to complete urban, that undergo such harassment. Generally it could be difficult to prove the harassment because not always could there be documentary evidence. Hence a lot of women prefer alternate ways of dealing with it, like taking leaves or even worse, resigning from the job. Therefore, the nature of evidence needs to be pre-determined and the workers should be made aware of the same – for example, including testimonies by persons with whom the victim might have shared the incident. This would, perhaps, ensure better accessibility for victims to redress their grievance. Although the Act expressly mentions that failure to substantiate complaint with adequate proof will not amount to ‘malicious or false complaint’, there is probably a thin line when one has to decide between proving guilt with/without evidence and a false complaint.

A survey reveals that the main cause of non-reporting are:³⁸

- fear of losing job
- fear of not getting promotions
- fear of victimization by the employer
- fear of being neglected by her fellow workers
- fear of being neglected by her family members and among others

Notwithstanding that it took more than a decade to give flesh and blood to an already existing skeletal framework, the Act is left with certain loopholes, which impedes the victim from securing complete justice. They are as follows:-

The Act does not cover in its scope and ambit a very important community, that are agricultural workers.³⁹ Agricultural workers constitute a substantial percentage of the working population in this country and while all other

³⁷ §19, Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013

³⁸ Ranga & Associates, “Sexual Harassment Act – Salient features,” accessed March 28, 2016, <https://rangachenna.wordpress.com/2014/09/17/sexual-harassment-act-salient-features/>.

³⁹ Divanshu Gupta and others, “A Research Paper On The Brief Critical Analysis Of Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013,” accessed March 29, 2016, <http://www.gnlu.ac.in/Directorate%20of%20Research%20Activities/Research%20Paper%20-%20Sexual%20Harassment%20Act%20-%20Critical%20Analysis.pdf>.

sectors receive express mention, non-inclusion of agriculture is certainly an escape clause. However, the Verma Committee Report had clearly suggested that unorganized sectors, specifically mentioning armed forces and police, agricultural workers and women students and staff of all schools and educational institutions, be included within this Act to maintain the spirit of *Vishaka* judgment.⁴⁰

Lodging complaints with a body like the Internal Complaints Committee, which constitutes of not less than 50 percent women, may lead to biased decisions. Additionally, the aspect of professional rivalry may also crop up. For example, it is not always necessary that the complainant and the panel (one or few of them) might be in good terms. This could in turn affect the nature of proceedings. Hence, a more neutral forum would be ideal.

The composition of the committee members should have compulsorily been an odd number to enable the committee to reach a majority-based decision.⁴¹

Sadly, the Act does not specify the amount for fines to be collected and it is the committees that decide the amount depending on the accused person's status and income. Consequently, even though the nature of offence may be same, the punishment would largely depend on the financial status of the offender.

Advancing on the point of inequality it is worth mentioning that even though this legislation is welcomed with open arms and was long due, the biggest setback remains that the Act is not gender-neutral. It deals only with the issue of sexual harassment of women employees. A Constitution that boasts of equality and gender justice, keeping male employees outside this law is not quite appreciated. Although sexual harassment of men at workplaces might be numerically lower compared to that of women, it cannot be completely ignored. Not including men within the ambit of the Act deprives them of the opportunity of being a beneficiary of this statute even if they find themselves under similar circumstances.

Furthermore, the Act does not define 'hostile environment'. Although the Standing Committee Report recommended including the same in order to avoid ambiguity, the statute fails to do so.⁴²

In 2014, a two-judge bench of the Central Administrative Tribunal (CAT) put few provisions of the Act of 2013 through the wringer, particularly Sections 4⁴³ and 7⁴⁴. Both the sections deal with the composition of the ICC and LCC, which are the two major redressal forums under the Act. The tribunal said the appointment process was "biased" as two members of such committees should be "committed to the cause of women," and hence "destroys the concept of fairness"

⁴⁰ "Focus Group Discussion on Prevention of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013," accessed March 29, 2016, <http://www.nmew.gov.in/WriteReadData/1892s/8294811166SHA%20Report%20final.pdf>.

⁴¹ Divanshu Gupta and others, "A Research Paper On The Brief Critical Analysis Of Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013," accessed March 29, 2016, <http://www.gnlu.ac.in/Directorate%20of%20Research%20Activities/Research%20Paper%20-%20Sexual%20Harassment%20Act%20-%20Critical%20Analysis.pdf>.

⁴² Kausiki Sanyal, "Comparison of Bill, Act and Standing Committee Recommendations," *PRS Legislative Research*, accessed March 29, 2016, <http://www.prsindia.org/uploads/media/Sexual%20Harassment/Comparison%20of%20Bill,%20Act%20and%20Standing%20Committee%20Recommendations.pdf>.

⁴³ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, §4 – Constitution Of Internal Complaints Committee

⁴⁴ Act of 2013, § 7 - Composition, tenure: and other terms and conditions of Local Complaints Committee.

embedded in the process of adjudication.⁴⁵ However, as tribunals have no power to strike down the law, it has recommended to the Union government to look into Sections 4 and 7 of the Act, under which committees are constituted to hear complaints of sexual harassments, and take corrective steps in compliance with the Constitution of India.⁴⁶

It has been argued that if in a ten member committee, two members represent a particular mindset or commitment towards a specific ideology then it is only natural that ordinarily while deciding cases, the scales would tip towards the victim. This in turn would make false allegations and complaints more rampant, which in fact was the primary concern of the tribunal.

The tribunal looked into four cases to arrive at this decision; one of them being the Kudremukh Iron Ore Company Ltd., Mangalore case, where a whistleblower of the company was alleged of sexually harassing three women employees. The accused approached the CAT and the bench held that the complaints were ‘frivolous’ in nature, intentionally made to silence the whistleblower.⁴⁷ In another alarming case involving an Employee State Insurance Company employee, the complaint against him was not of sexual harassment, nevertheless a *Vishaka* Committee was formed and he had to face a transfer. The bench wondered what relevance the *Vishaka* committee had in such a case, especially when the complainant’s behaviour was unbecoming of a government servant, and could amount to forgery, which is a criminal offence.⁴⁸

Passing of any legislation is only half the battle won; the main victory lies in its successful execution. The victim or aggrieved person’s access to justice is the ultimate goal. The concept of ‘Access to Justice’ has two significant components.⁴⁹

- First is a strong and effective legal system with rights, enumerated and supported by substantive legislations.
- The second is a useful and accessible judicial/ remedial system easily available to the litigant public.

The Sexual Harassment Act, 2013 perhaps, pulls off the first yardstick, however falls short when it comes to more useful second part. There should be a mechanism developed by the State to check whether all employment sectors have in fact duly constituted a Sexual Harassment Prevention Cell and whether all the prescribed guidelines are actually being meted out. Furthermore, the complaint mechanism needs to be more neutral, in terms of ensuring fairness, at the same time maintaining confidentiality so as to not have any adverse effects on the victim neither on the accused.

⁴⁵ Krishna Prasad, “CAT finds illegality in law against sexual harassment at workplace,” *The Hindu* July, 14 2014, accessed March 30, 2016, <http://www.thehindu.com/news/national/karnataka/cat-finds-illegality-in-law-against-sexual-harassment-at-workplace/article6204747.ece>.

⁴⁶ Krishna Prasad, “CAT finds illegality in law against sexual harassment at workplace,” *The Hindu* July, 14 2014, accessed March 30, 2016, <http://www.thehindu.com/news/national/karnataka/cat-finds-illegality-in-law-against-sexual-harassment-at-workplace/article6204747.ece>.

⁴⁷ Umesh R Yadav, “CAT Highlights Misuse of Sexual Harassment Law,” *The Indian Express*, July 03, 2014, accessed March 30, 2016, <http://www.newindianexpress.com/states/karnataka/CAT-Highlights-Misuse-of-Sexual-Harassment-Law/2014/07/03/article2312107.ece>.

⁴⁸ Umesh R Yadav, “CAT Highlights Misuse of Sexual Harassment Law,” *The Indian Express*, July 03, 2014, accessed March 30, 2016, <http://www.newindianexpress.com/states/karnataka/CAT-Highlights-Misuse-of-Sexual-Harassment-Law/2014/07/03/article2312107.ece>.

⁴⁹ Hon’ble Mr. Justice F.M. Ibrahim Kalifulla, “Rule of Law and Access to Justice,” *NJA South Zone Regional Judicial Conference on “Role of Courts in upholding Rule of Law” at Tamil Nadu State Judicial Academy* January 31, 2014 to February 02, 2014, accessed March 31, 2016, <http://hcraj.nic.in/joc2014/16.pdf>.

The Hon'ble Supreme Court has ruled that "each incident of sexual harassment at the place of work results in violation of the fundamental right to gender equality and the right to life and liberty - the two most precious fundamental rights guaranteed by the Constitution of India".⁵⁰

CONCLUSIONS

The Sexual Harassment of Women at Workplaces Act, 2013 is a historic legislation, which not only patronizes women empowerment but also gives to some extent a legal structure to a perpetual problem. It would not be wrong to say that despite the sixteen year long wait, the Act seems to be impulsively formulated and has been rightly called a "double-edged sword". Although it being gender sensitive is highly appreciated, that it should have been gender neutral cannot be denied. Moreover, one needs to understand that even today in a nation like ours, although the position of women has escalated, not all sections of the society have accepted this change. Hence, a woman from a less modern background might have been able to break the shackles and began working but it would take her a lot more courage to bring forward a complaint of sexual harassment. This could be because of the fear of losing her job or blemishing her reputation. Another interesting inclusion in the statute is the ability of the employer to punish the complainant in case of a false or malicious complaint.⁵¹ This provision, although meant to protect the employer's interests, is likely to deter victims from reporting such incidents and filing complaints.⁵² Either way the purpose of the enactment is defeated. Therefore, the primary focus should be on providing a healthy work environment.

A survey of working women carried out by the National Commission for Women reveals that no doubt the number of cases filed for sexual harassment has risen but women employees are still reluctant to report the matter to concerned authority.⁵³ Indeed a woman suffers it silently and avoids lodging report because she believes that her complaint would disadvantage her in connection with her employment. While 40 per cent of the victims surveyed said they usually ignored such provocation, 3.54 per cent said they reported these to their supervisors, 7.8 per cent to their colleagues and 1.4 per cent to the police.⁵⁴ This indicates the huge margin between the number of cases taking place and the number of cases actually undergoing the justice mechanism. Even though the Supreme Court evolved a mechanism to tackle sexual harassment at workplaces, in reality not much of it was implemented.

The Sexual Harassment of Women at Workplaces Act, 2013 is undoubtedly a historic legislation, which not only patronizes women empowerment but also gives to some extent a legal structure to a perpetual problem. However, there still remains ample scope for amendments in the statute, which would ensure better enforceability as well as better access to justice by the victims.

⁵⁰ *Export Promotion Council v. A.K. Chopra*, J.T.1999(1) SC61.

⁵¹ Veena Gopalakrishnan and Vikram Shroff, "India's New Law on Prohibition of Sexual Harassment at Workplace," *The Chamber's Journal*, accessed March 31, 2016, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/India_s_New_Law_on_Prohibition_of_sexual_harassment_at_the_work_place.pdf.

⁵² Veena Gopalakrishnan and Vikram Shroff, "India's New Law on Prohibition of Sexual Harassment at Workplace," *The Chamber's Journal*, accessed March 31, 2016, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/India_s_New_Law_on_Prohibition_of_sexual_harassment_at_the_work_place.pdf.

⁵³ S.C. Srivastava, "Sexual Harassment of Women at Work Place: Law and Policy," *Indian Journal of Industrial Relations*, (Jan., 2004), accessed March 31, 2016, <http://www.jstor.org/stable/27767912>.

⁵⁴ S.C. Srivastava, "Sexual Harassment of Women at Work Place: Law and Policy," *Indian Journal of Industrial Relations*, (Jan., 2004), accessed March 31, 2016, <http://www.jstor.org/stable/27767912>.

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3. *Everyone, without any discrimination, has the right to equal pay for equal work.*
4. *Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.*
5. *Everyone has the right to form and to join trade unions for the protection of his interests.*
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14. AIR 1982 SC 1473.
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28. Article 21: No person shall be deprived of his life or personal liberty except according to procedure established by law
29. Article 19: Right to Freedom - (1) All citizens shall have the right— (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; (g) to practise any profession, or to carry on any occupation, trade or business.
30. Constitution of India, Article 141: The law declared by the Supreme Court shall be binding on all courts within the territory of India.
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physical contact and advances; or

a demand or request for sexual favours; or

making sexually coloured remarks; or

showing pornography; or

any other unwelcome physical, verbal or non-verbal conduct of sexual nature
34. *Act of 2013, § 2(o)*: “workplace” includes--
35. *any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;*
36. *any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service; hospitals or nursing homes; any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto; any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey; a dwelling place or a house;*
37. *Act of 2013, § 2(g)*: “employer” means--in relation to any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit of the appropriate Government or a local authority, the head of that department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit or such other officer as the appropriate Government or the local authority, as the case may be, may by an order specify in this behalf; in any workplace not covered under sub-clause (i), any person responsible for the management, supervision and control of the workplace. Explanation. --
For the purposes of this sub-clause “management” includes the person or board or committee responsible for formulation and administration of policies for such organisation;(iii) in relation to workplace covered under sub-clauses (i) and (ii), the person discharging contractual obligations with respect to his or her employees;(iv) in relation to a dwelling place or house, a person or a household who employs or benefits from the employment of domestic worker, irrespective of the number, time period or type of such worker employed, or the nature of the employment or activities performed by the domestic worker.
38. *Act of 2013, § 2(f)*: “employee” means a person employed at a workplace for any work on regular, temporary, ad hoc or daily wage basis, either directly or through an agent, including a contractor, with or, without the knowledge of the principal employer, whether for remuneration or not, or working on a voluntary basis or otherwise, whether the terms of employment are express or implied and includes a co-worker, a contract worker, probationer, trainee, apprentice or called by any other such name.
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